No. 18,200

IN THE

United States Court of Appeals

For the Ninth Circuit

MARVIN SHERWIN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING

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To Circuit Judges, Honorable Walter L. Pope, Honorable Stanley N. Barnes and Honorable Gilbert H. Jertberg:

Now comes Marvin Sherwin through his attorneys, James E. Burns and Richard H. Foster, and petitions this Court for a rehearing in the case of *Sherwin v. United States,* No. 18,200, decided June 11, 1963, and suggests, for the reasons hereinafter stated, that the case be reheard en banc.

I. THE COURT HAS INCORRECTLY INTERPRETED APPELLANT'S DEFENSE.

Ordinarily, we would not urge the facts surrounding the defense of lack of wilfulness to the Court of

Appeals since this defense is one which the jury's verdict usually removes from this Court's review. Here, however, where one of the principal grounds of appeal is that the Court's instructions on wilfulness were improper, we think it important that the Court understand the nature of the defense presented to the jury and, as here, where an instruction was given which this Court has previously held to be plain and reversible error we feel it our duty to correct what we believe to be the Court's erroneous interpretation of the defense.

In Footnote 26 of the Opinion, the Court makes the assertion that there was no claim that appellant *thought* the Bechtel losses affected his tax liabilities for the years 1954, 1955 and 1956. This statement we believe to be erroneous. If the Court will examine the original claim for refund (Exhibit E) in connection with these losses, it will note that the claim is for an operating loss carry back. A capital loss cannot be an operating loss carry back. In the technical computation of the amount of operating loss, the accountant treated a portion of the Bechtel loss as a capital stock loss. One unfamiliar with the involved techniques of tax accounting, however, would assume that the entire loss claimed was the kind of loss which could be carried back and carried forward, thus in this case affecting, by way of carry forward, the years 1954, 1955 and 1956. In the event a capital loss was involved, appellant, as the Government conceded and in fact gave credit in its computations, could take One Thousand Dollars ($1,000) as against ordinary

income in the indictment years. Joyce, appellant's accountant, however, a former Internal Revenue agent, did not deduct this One Thousand Dollars ($1,000) even though if the loss had been capital in nature, it would have been a proper deductible item. As Joyce, appellant, and other witnesses testified, everyone realized that because of the complex nature of appellant's affairs, amended returns would necessarily have to be filed. As appellant stated in his statement to the Internal Revenue Service in connection with his refund claim (Exhibit B), the exact amount of the Bechtel losses were not known at that time. The total amount of appellant's losses, as this Court itself recognizes, will not be established until the final determination of the Santa Rosa litigation. It was natural, therefore, for appellant to assume that these losses could be established by a claim for refund filed in the same manner as the one which the Government granted. (Government Exhibit 12.)

Even from a technical point of view, the loss claimed on the 1952 claim for refund resulted in ordinary loss treatment for the Bechtel interests and an operating loss carry forward. Appellant was treated as a promoter of corporations. Otherwise, the payment by him of corporate obligations would not give rise to an ordinary loss. It is this fact which makes any losses therefrom deductible in full. (We might add that a closing agreement would not be necessary to bind the Department of Justice, the Grand Jury or the Courts. The cases referred to by the Court refer only to a determination by the Commissioner and do

not affect Section 6404 of Title 26, since the Commissioner is not a party to this action and never has been.)

In any event, the Government treated the Bechtel losses as an operating loss which could be carried forward. Appellant's accountant, in the 1954, 1955 and 1956 tax returns, did not treat them as capital losses. Appellant at all times has maintained that he believed his losses far overcame any income which he earned in the indictment years.

We reiterate that we are not attempting to reconstitute this Court of Appeals as a jury passing on the issue of appellant's wilfulness or lack of wilfulness. We, however, believe that considering our arguments on the trial Court's instructions on that subject, the Court should bear in mind that appellant claimed, and reasonably could have thought, that he overpaid his taxes in the indictment years.

II. THE COURT'S RULING ON THE MURDOCK INSTRUCTIONS IS IN CONFLICT WITH THE FACTS AND OTHER DECISIONS OF THIS COURT.

The Court, in its opinion, while not directly asserting that the so-called Murdock instructions given by the Court were in error, does not indicate that it disagrees with *Bloch v. United States,* 9th Circuit, 221 Fed. 2d 786; *Abdul v. United States,* 9th Circuit, 254 Fed. 2d 292; *United States v. Palermo,* 3rd Circuit, 295 Fed. 2d 872. The Court simply refuses to exam-

ine the question on the grounds that proper objection was not made to the instructions.

The Murdock instruction was given twice by the Court. One of these instructions apparently was originally submitted by the defense, that is, defense instruction 19. The other instruction, however, TR 1115-1116, contains a portion of the exact language used by the Government in the instruction to which objection was made. We quote the Court's statement of the instruction to which objection was made:

> ". . . If a man in good faith believes he has paid all the taxes he owes he cannot be guilty of criminal attempt to evade the tax. But if a man acts without reasonable grounds for belief that his conduct is lawful, it is for the jury to decide whether he willfully intended to evade the tax. . . ."

The instruction actually given was as follows:

> "If a taxpayer honestly believes that he has paid all the taxes he owes, he is not guilty of criminal evasion. But if he acts without reasonable grounds for belief that his conduct was lawful, it is for you to decide whether he was acting in good faith or whether he intended to evade the tax."

Rule 30 contains no other requirement than that a defendant object to an instruction. This, appellant's counsel did. Even assuming that appellant, by objecting to the quoted language did not withdraw or object to the same language which appears in defense instruction 19, it appears to us that appellant has

done all that he reasonably can be expected to do in the way of objecting to the instruction quoted above which was given by the Court.

We must emphasize this is not a case where the trial Court was misled by counsel. The objection was given prior to instructions. The Court was specifically advised of the precise cases which disproved the instruction. The Court advised counsel that it would read these cases. After the Court had read these instructions, it nevertheless, after opportunity for reflection, gave it anyway. The Court, in fact, gave it not once, but twice. Despite the fact that in *Bloch v. United States,* supra, this Court held that the instruction was plain error and despite the fact that in this case, as we previously indicated, the definition of "wilfulness" was crucial.

In *Herzog v. United States,* 235 Fed. 2d 664, no objection at all was made to the instruction there given. The matter was not even raised on appeal but only on a petition for rehearing. Furthermore, there the case turned on a factual dispute, as this Court emphasized. As the Court there stated, "There was no claim on his part of inadvertence, mistake or the like. The issue was squarely one of credibility. . . ." Here the facts were stipulated and the issue involved was a simple question of wilfulness or non-wilfulness in signing the return.

We submit to the Court that no greater burden rests on the defense than to object to an improper instruction once. That once an objection to the instruction is made, even if that instruction is repeated in

order to save his record on appeal the same objection need not be repeated again and again. We think that this principle is particularly applicable in a case where this Court has held the instruction to be plain error under Rule 52.

Our conclusion in this matter is reinforced by the trial Court's instruction on intent. This Court does not overrule *Bloch v. United States,* supra, and indicates that a specific instruction referring to tax cases with respect to the natural and probable consequences of omitting income was error. We believe that the general instruction given here can be no less erroneous because of the absence of specific language. It seems to us a novel theory and one that should be reconsidered by the whole Court that the position in which an instruction is found, the fact that it is general rather than specific and that some of the instructions given were proper ones rehabilitates an instruction. Here, the Court gave a bad instruction on wilfulness and what appears to be a bad instruction on intent. We cannot see how improper instructions on these subjects in a case of this character could have any other result than a grave miscarriage of justice and an unfair trial.

III. THE COURT'S RULING ON THE PLAZA BUILDING INSTRUCTION RAISES GRAVE PROBLEMS.

The Court, with respect to appellant's complaint of the rejection of instruction 36, states as follows:

> "Here again we think that the evidence is insufficient to show any such loss. The evidence

> shows that litigation between Tarman and Sherwin with respect to their several rights in the properties of the partnership were still pending in the state court at Santa Rosa but no judgment had been entered in that case. Sherwin testified that at the time of the trial that property remained in a 'status quo'. The upshot of this is that if Sherwin ultimately should lose that property or his interest therein, a loss might then occur, but if he should win he would be liable for additional unreported partnership income for the years here in question arising out of the profits of the 'Plaza Building'. We find no error in the rejection of this proposed instruction."

It is apparent that the Court recognizes that if the Santa Rosa litigation ends adversely to appellant, he may have a sizeable tax loss. We feel we should inform the Court that since the trial in this case, the Santa Rosa litigation has ended unfavorably to appellant. While this action is presently on appeal, in the event that the Santa Rosa Court's judgment is upheld, appellant will have lost the Plaza Building whose tax basis is Seventy-Five Thousand Dollars ($75,000), that is to say, approximately twice the amount which the Government claims appellant evaded. This loss, as the Court can determine from an examination of the opinion of the Santa Rosa Court introduced in evidence, occurred in the year 1954, one of the indictment years. It is based upon a contention by Mr. Tarman that appellant transferred this property to him in that year. Appellant's loss, under elementary tax law pursuant to Section 1231

of the Internal Revenue Code, would have occurred in that year and would have wiped out any income tax liability. In other words, if the Santa Rosa judgment remains as it is, this Court will have affirmed a judgment where a taxpayer has overpaid his taxes. It will have justified a jail sentence for a man innocent as a matter of law. Even the Government concedes, and this Court has previously indicated, that an individual cannot be convicted unless he has evaded income tax.

We did not ask the Court below to rule as a matter of law on the Plaza Building losses. But even though the decision of the Santa Rosa Court is not final, the facts on which this decision was based existed at the time of the filing of the tax returns and existed at the time of the trial. We submit that the jury should have been allowed to pass on these facts and determine whether or not appellant, under the Internal Revenue laws, owed additional income tax not reported by him.

IV. OTHER ERRORS.

We believe that the Court's treatment of the various claims of error surrounding the introduction by the Government of failure to report partnership income is inconsistent. The Court concedes that the introduction of evidence of unreported partnership income was probably error. It, however, seeks to justify the giving of an instruction on this admittedly improper evidence on the basis that there was evi-

dence of unreported partnership income. Furthermore, it then justifes the denial of Agent Neilands' report on that partnership on the basis that this evidence was not in the case because not listed among the items which formed the Government's bill of particulars. It is our position that if this evidence was admissible at all under any theory, then the defense had the right to examine Agent Neilands' report concerning it. We do not believe, considering the trial Court's express instruction on the subject, that the failure of the Court to allow the defense even an opportunity to examine this report can be considered a harmless matter. The accountant, Moran, did not ever claim that he had access to all of Neilands' work papers nor did he ever claim he had examined the report in question. We submit that elementary considerations of fair play require that where evidence is introduced against a defendant, the defendant should have an opportunity to investigate relative evidence bearing on the point even though that evidence is contained in a Government report.

We must also respectfully disagree with the Court's statement that the Government did not attempt to paint appellant a scoundrel by trying to show that he took legal fees while on the bench. An examination of the various transactions involved will demonstrate to the contrary. The Tarman, Jr. testimony referred to a transaction which occurred after appellant took the bench and the whole purpose of this testimony was designed by the prosecution to discredit and disparage appellant.

V. CONCLUSION.

This case presents a difficult and delicate problem to the Court. We recognize the natural feeling of horror of everyone created when a member of the judiciary is involved in criminal litigation. The natural inclination is to immediately assume that since the defendant, and appellant here, was a judge "he should have known better." However, the danger exists that this feeling can so permeate the case as to prejudice that which even a Superior Court Judge is entitled to—a fair trial. Where, as here, the mere fact of accusation supercharges the emotions, stringent care must be taken to insure that the proceedings are proper. In the instant case, in the last analysis, the crucial issue is whether appellant negligently prepared his tax return or wilfully attempted to evade taxes. Because of his position, the possibility of finding an unprejudiced lay jury is remote. The instructions, therefore, which set the standards under which he is tried must be clear and in accordance with the law. In the present case, appellant was convicted under a definition of "wilfulness" which the Court felt was improper in trying a notorious gangster. (*United States v. Palermo,* supra.) It should be emphasized that in the *Palermo* case the standards were those imposed by the Court in a Court trial, rather than instructions given a lay jury. Here, where the majority of the facts were stipulated and where a lay jury is judging one who in the very nature of things they cannot realize is a fallible human being, this instruction is of crucial importance. We simply ask

each judge of the Court of Appeals to consider whether or not if he were in like circumstances to appellant he would believe that the instructions on intent and wilfulness given here were proper.

Dated, San Francisco, California,
July 11, 1963.

James E. Burns,
Richard H. Foster,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL

We hereby certify that in our judgment this petition for rehearing is well founded and is not interposed for delay.

Dated, San Francisco, California,
July 11, 1963.

James E. Burns,
Richard H. Foster,
Attorneys for Appellant and Petitioner.

AFFIDAVIT OF MAILING

State of California

City and County of San Francisco - SS

M. J. Connolly, being first duly sworn deposes and says:

That he is a citizen of the United States of America, over the age of twenty-one years and not a party to the action of "Sherwin vs. United States of America", in the United States Court of Appeals, for the Ninth Circuit, No. 18200;

That on July 11, 1963, he mailed by first class mail, postage prepaid, three copies of the appellant's petition for a rehearing, in the above entitled action, to Cecil F. Poole, United States Attorney, 422 Post Office Building, San Francisco, the attorney for appellee. The above is the last known address of said attorney.

M. J. Connolly

Subscribed and sworn to before me
this 11th day of July, 1963

Marie B. Sullivan

Notary Public in and for the
City and County of San Francisco
State of California